Supreme Court of the United States

OCTOBER TERM, 1941.

No. 837.

SMITH BETTS,

Petitioner,

vs.

PATRICK J. BRADY, WARDEN OF THE PENITENTIARY OF MARYLAND,

Respondent.

BRIEF OF RESPONDENT.

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BRIEF OF RESPONDENT.

NATURE OF THE CASE.

This case is before the Court on the granting of a writ of certiorari to the Honorable Carroll T. Bond, Chief Judge of the Court of Appeals of Maryland, and one of the Judges of the State of Maryland, who, acting as such Judge, declined to release the Petitioner in an habeas corpus proceeding and remanded the Petitioner to the custody of the Respondent.

THE OPINION BELOW.

There is no official report of the Honorable Carroll T. Bond in these proceedings, but an opinion was rendered by him and is set forth in the Transcript of the Record filed in these proceedings, at pages 26-31.

THE JURISDICTION OF THIS COURT.

The Petitioner claims that this Court has jurisdiction to review the proceedings before the Honorable Carroll T. Bond under the provisions of Section 237 of the Judicial Code; 28 U. S. C. A. 344. Certiorari was granted by this Court on February 16, 1942, — U. S. —, 86 L. Ed. (Advance Sheets) 564, with the request that counsel, on the argument of this case, "discuss the jurisdiction of this Court, particularly (1) whether the decision below is that of a court within the meaning of Section 237 of the Judicial Code, and (2) whether state remedies, either by appeal or by application to other judges or any state court, have been exhausted."

STATEMENT OF THE CASE.

The Respondent adopts the statement of the case as contained in the Brief of the Petitioner.

QUESTIONS IN CONTROVERSY.

I.

Does this Court have jurisdiction to review an order of a State judge entered in an habeas corpus proceeding, remanding a prisoner to custody?

(a) Was the decision below that of a "court" within the meaning of Section 237 of the Judicial Code?

(b) Has the Petitioner, either by appeal or by application to other judges or any other State Court, exhausted his State remedies?

II.

Does the Fourteenth Amendment to the Constitution of the United States require a State court, on habeas corpus, to release a prisoner confined under the sentence of a State court of general jurisdiction after conviction of a crime

less than capital, solely because the prisoner was indigent and unable to procure counsel, where the State court, though requested, declined to appoint counsel for him?

(a) Does the Fourteenth Amendment to the Constitution of the United States require the appointment of counsel for indigent prisoners by State courts where such prisoners are charged with crimes less than capital?

(b) Is the judgment of a State court convicting a prisoner of a crime less than capital void, where the prisoner is indigent and unable to procure counsel, and where the State court, though requested, declined to appoint counsel for him?

ARGUMENT.

I.

DOES THIS COURT HAVE JURISDICTION TO REVIEW AN ORDER OF A STATE JUDGE ENTERED IN AN HABEAS CORPUS PROCEEDING, REMANDING A PRISONER TO CUSTODY?

(a) Was the decision below that of a "court" within the meaning of Section 237 of the Judicial Code?

This question has been directly passed upon by this Court in *McKnight v. James*, 155 U. S. 685. In that case, the Petitioner sought a writ of habeas corpus before a judge of one of the courts of Ohio, alleging that he was held under a void sentence for perjury, imposed by another Ohio Court. The writ was granted and the return of the Sheriff to whom it was directed, showed that he held the Petitioner under a conviction and sentence that had been affirmed by the Supreme Court of Ohio. The Petitioner replied that after pleading not guilty to the charge of perjury, he was brought into court indigent and without counsel, that the court tried him without counsel in violation of his constitutional rights under the Fourteenth Amendment of the Constitution of the United States, and that the

sentence was also void in that he was required to work at hard labor, although this was not part of the sentence. The case was heard at chambers and the prisoner was remanded to custody. A petition for a writ of error to review the order was dismissed by this Court, which held that, since a writ of error would only lie to the highest court of the State, it would not lie to review an order of a judge at chambers. The petitioner argued in support of his petition for the writ, that the order of the judge at chambers could not be reviewed by the Supreme Court of Ohio, and that, therefore, the order of such judge was the order of the highest court of the State in which a decision could be had. This Court, however, pointed out that an order of the Circuit Court of Ohio, as distinguished from the order of the judge thereof, would have been reviewable by the Supreme Court of the State, and that the petitioner should have had the order of the judge made an order of court.

To the same effect is *Clarke v. McDade*, 165 U. S. 168, in which the petitioner was adjudged in contempt by a State court after his failure to obey an order directing him to file inventories in an insolvency proceeding. He sought numerous writs of habeas corpus from State judges, alleging confinement in violation of the United States Constitution. Nowhere in the proceedings filed in support of his petition for a writ of error did there appear a judgment of a court, although orders of State judges dismissing the writs and remanding the prisoner were shown. Writs of error from these orders were dismissed, and this Court said at page 172:

> "The fatal objection appears in each case that the so-called court orders made upon the returns to the several writs of habeas corpus, which were granted by a judge and returnable before him, do not constitute that final judgment or decree in a suit in the high-

> est court of a state in which a decision in the suit could be had which may be reviewed on writ of error from this court under U. S. Rev. Stat. par. 709. If these various orders did constitute such a final judgment, it does not appear in the record that any question arose in such a manner as would give this court jurisdiction to review the same under the above-named section."

Similar decisions have been rendered with respect to the right to review decisions of United States Circuit Judges in habeas corpus proceedings. *Carper v. Fitzgerald*, 121 U. S. 87; *Lambert v. Barrett*, 157 U. S. 697. Cf. *Craig v. Hecht*, 263 U. S. 255, in which it was held that judges of Circuit Courts of Appeal, may not issue writs of habeas corpus, but may sit as district judges and if so, their orders as such district judges are reviewable by the Circuit Court of Appeals.

Unless these cases are distinguishable from the case at bar by reason of Maryland practice in proceedings involving writs of habeas corpus, it would appear that the present order cannot be reviewed by this Court, without specifically overruling the *McKnight* and *McDade* cases.

It will be remembered that in the *McKnight* case, this Court pointed out that had the order remanding the prisoner been entered by one of the Ohio Courts, as distinguished from a judge at chambers, such order would have been reviewable by the highest court of Ohio. This, however, is not true in Maryland. Section 1 of Article 42 of the Annotated Code of Maryland (1939 Ed.) provides as follows:

> "The court of appeals and the chief judge thereof shall have the power to grant the writ of *habeas corpus*, and to exercise jurisdiction in all matters relating thereto throughout the whole State. The circuit courts for the respective counties of this State, and

the several judges thereof, out of court, the superior court of Baltimore City, the court of common pleas of said city, the circuit court and circuit court No. 2 of Baltimore City, and the Baltimore City court, and the judges of said several courts, out of court, and the judge of the court of appeals from the city of Baltimore, shall have the power to grant the writ of *habeas corpus*, and to exercise jurisdiction in all matters pertaining thereto."

It is not from this Section alone, however, that the power of the judges of this State to issue writs of habeas corpus is derived. Earlier provisions of the above Section had sought to restrict the power of such judges in habeas corpus cases to the issuance of writs to keepers of prisons located within the limits of the circuits of such judges. Such a restriction, however, was held invalid in *Glenn v. State*, 54 Md. 572, in which the Maryland Court of Appeals discussed the early history in England of the issuance of a writ of habeas corpus by judges in chambers, and came to the conclusion that a judge in Maryland, by reason of constitutional provisions making him a conservator of the peace, may issue, at chambers, the writ to run throughout the State, and that any statute restricting such jurisdiction is invalid under the State Constitution. See also *Deckard v. State*, 38 Md. 186.

The Court of Appeals of Maryland, however, has no right to entertain original petitions for writs of habeas corpus, because the Constitution of the State establishes such court as an appellate body only, and, therefore, that portion of Section 1 of Article 42, above quoted, attempting to grant jurisdiction to the Court of Appeals to entertain original petitions of such writ is invalid. *Sevinskey v. Wagus*, 76 Md. 335. Individual judges of such Court, however, by virtue of the Constitution of the State making

them conservators of the peace, may issue the writ. *Ex parte Maulsby*, 13 Md. 625; *ex parte O'Neill*, 8 Md. 227.

It will be seen, therefore, from the decisions cited above that all judges of all courts of general jurisdiction in Maryland may issue writs of habeas corpus, and that all such courts in Maryland, with the exception of the Court of Appeals may also issue such writs. However, regardless of whether such writs are issued by the judges or by the courts, there is no right of review by the Court of Appeals of Maryland except in certain instances specifically provided for by statute, which are inapplicable here. *Jones v. Doe*, — Md. —, 16 A. 2d 901; *Rigor v. State*, 101 Md. 465; *Annapolis v. Howard*, 80 Md. 244; *Coston v. Coston*, 25 Md. 500; *in re Coston*, 23 Md. 271; *Bell v. State*, 4 Gill (Md.) 301.

In the case at bar, Chief Judge Bond was acting as one of the judges of the State, having power to issue the writ. The proceeding was conducted in the same manner as any other proceeding for a writ of habeas corpus filed in this State, and the order as entered, in its effect, was the same as any other order entered in such proceeding with the exception that Judge Bond signed it as judge, rather than as a court. In its effect on the prisoner, however, it was exactly the same as if it had been entered by a court of the State, since the prisoner had no right to a review of such order by the Court of Appeals of Maryland. In this respect, the case differs from *McKnight v. James, supra* for it appears that there, had the petitioner sought the writ before a court of Ohio, the case could have been reviewed by the highest court of that State.

In view of the foregoing, the Respondent feels that in practical effect, the order of Chief Judge Bond was that of a court, just as much as if such proceeding had been filed in one of the established courts of this State.

(b) Has the petitioner either by appeal or by application to other judges or any other court exhausted his state remedies?

It has already been shown that under the laws of the State of Maryland the petitioner has no right of appeal either from the action of a judge or of a court in habeas corpus proceedings. It is also quite clear that under the State law a person imprisoned may make continued applications for the writ of habeas corpus so long as he is able to find a State judge or court to whom the application for the writ may be made. *Jones v. Doe, supra, Annapolis v. Howard, supra, Coston v. Coston, supra,* at page 506, *In re Coston, supra,* at page 272, *Bell v. State, supra,* at page 304, *Ex parte Berman,* 14 Fed. Supp. 716.

A recent Maryland statute, Chapter 484 of the Acts of 1941, repeals and reenacts, with amendments, Section 3 of Article 42 of the Annotated Code of Maryland, 1939 Edition, relating to habeas corpus proceedings. The above section as amended provides as follows:

> "3. Any person committed, detained, confined or restrained from his lawful liberty within this State for any alleged offense or under any color or pretense whatsoever, or any person in his or her behalf, may complain to the Court or judge having jurisdiction and power to grant the writ of habeas corpus, to the end that the cause of such commitment, detainer, confinement or restraint may be inquired into; and the said respective courts or judges to whom such complaint is so made shall, unless it appears from the complaint itself or the documents annexed, that the petitioner would not be entitled to any relief, forthwith grant the writ of habeas corpus, directed to the office or other person in whose custody or keeping the party so detained shall be, returnable immediately before the said court or judge granting the same."

Chief Judge Bond in his opinion in the case at bar mentions this statute in the following terms (R. 27):

> "There is now no specific statutory denial of a right to repeated writs, and no specific allowance of it. The statute, (section 3), refers only to a single instance of complaint and appplication. It seems to me, however, that the amendments made could not fairly be said to show a legislative purpose to depart so far from the former practice as to deny all power to issue a second writ. At the same time I cannot believe the Legislature could fairly be considered to have intended leaving the frequent applicant mentioned at liberty to continue obtaining writs indefinitely merely by omitting from his applications any showing that he is not entitled. My conclusion is that a judge would be acting in accordance with the purpose of the statute if he should accept the decision on a first writ as a sufficient adjudication on the complaint and refuse to issue a further one, or, having issued it, should remand the applicant—unless some extraordinary cause is shown against that action. This would require the exercise of some judgment on the second application, and because of that fact an order that cause be shown seems appropriate."

Apparently under this statute as construed by Chief Judge Bond, the order of a judge or court in a prior habeas corpus proceeding is not conclusive on the question of whether upon a second application, the writ should be granted or denied. It seems that the statute should be construed to require a judge hearing a subsequent application to give more consideration to a prior decision than had heretofore been given under Maryland practice. However there is no indication that the statute was intended to make such decision final and conclusive and a bar to a second petition for the writ. Hence there would seem to be no departure from the decisions heretofore cited with

respect to whether an order in a habeas corpus proceeding is final under the State law.

The fact, however, that under State practice an order of a judge or court is not final would not seem to be conclusive as to whether such an order is final within the meaning of Section 237 of the Judicial Code. In *Holmes vs. Jennison*, 14 Pet. 540, in which case the Justices of this court had divergent views and therefore no opinion for the court could be written, four of the judges were of the opinion that a petition for a writ of habeas corpus to obtain release on a criminal charge where detention is alleged to be in violation of the Constitution of the United States, is a suit within the meaning of the jurisdictional statute and that a judgment of a court remanding the prisoner in such proceedings is a final judgment of a State court. See also, in *Tinsley v. Anderson*, 171 U. S. 101, where on appeal from the order of a judge of one of the Texas courts, acting in an habeas corpus proceeding, the Texas Court of Criminal Appeals affirmed such order, it was held that such a proceeding is a suit over which this Court has appellate jurisdiction. To the same effect is the case of *New York, ex rel. Bryant v. Zimmerman*, 278 U. S. 63, wherein it was said:

> "A proceeding in a state court to obtain the release of one held in custody upon a criminal charge where the detention is alleged to be in violation of the Constitution of the United States, is a 'suit' within the meaning of the jurisdictional statute, and an order of the state court of last resort refusing to discharge him is a final judgment in that suit, and subject to review by this Court."

In view of the above decisions interpreting the very Section now before this Court for consideration, the Respondent feels that in so far as Section 237 of the Judicial

Code is concerned, the action of a judge in Maryland in remanding a prisoner to custody in habeas corpus proceedings is final.

II.

DOES THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REQUIRE A STATE COURT, ON HABEAS CORPUS, TO RELEASE A PRISONER CONFINED UNDER THE SENTENCE OF A STATE COURT OF GENERAL JURISDICTION AFTER CONVICTION OF A CRIME LESS THAN CAPITAL, SOLELY BECAUSE THE PRISONER WAS INDIGENT AND UNABLE TO PROCURE COUNSEL, WHERE THE STATE COURT, THOUGH REQUESTED, DECLINED TO APPOINT COUNSEL FOR HIM?

(a) Does the Fourteenth Amendment to the Constitution of the United States require the appointment of counsel for indigent prisoners by State courts where such prisoners are charged with crimes less than capital?

It is the contention of the Respondent in the present case that the appointment of counsel by a State court, where the prisoner is indigent and unable to procure counsel, is a necessary element of due process of law to the extent that a fair and just hearing would be thwarted by the failure to appoint counsel, *and to that extent only.* This is the view taken by Chief Judge Bond, as shown by his opinion in the case at bar. (R. 26-31). It was also the opinion of Judge Chesnut of the District Court of the United States for the District of Maryland, in *Gall v. Brady*, 39 Fed. Sup. 504, and *Carey v. Brady*, 39 Fed. Sup. 515. The decision of Judge Chesnut was affirmed on appeal by a divided court in 125 Fed. 2nd 253, hereinafter referred to, and a petition for a writ of certiorari is now before this Court for consideration.

There is no decision of this Court actually holding that such an appointment must be made, even in a capital case where the trial is otherwise fair. There is a statement to this effect in *Avery v. Ala.*, 308 U. S. 444, but the cases

(*Powell v. Ala.*, 287 U. S. 45; *Brown v. Miss.*, 297 U. S. 278) cited in support of the statement, do not sustain the proposition. A decision of this particular question with relation to capital cases is, however, unnecessary to the case at bar, since the Petitioner was convicted of a non-capital offense, and the point is mentioned only to show that there are no decisions of this Court actually deciding the proposition contended for by the Petitioner.

Until the case of *Powell v. Ala., supra*, it seems never to have been considered that the Fourteenth Amendment requires a State Court to appoint counsel for an indigent prisoner in criminal cases, and the then Circuit Judge, William Howard Taft, of the Southern District of Ohio, early said in *In re McKnight*, 52 Fed. 799, a case wherein a writ of habeas corpus was sought before him, based upon the failure of a State court to appoint counsel,

> "The right to have the assistance of counsel is not alleged to have been infringed. The averment is that the trial court failed or refused to assign counsel at the expense of the State, which is a very different thing. Failure to furnish counsel to a defendant is not a want of due process of law. If a State authority accords such a right to an indigent defendant, a denial of it is error only, which does not affect the jurisdiction of the court or render its sentence void."

The Court, itself, in the *Powell* case specifically limits the scope of its ruling by saying at page 71:

> "Whether this would be so in other criminal prosecutions or under other circumstances, we need not determine. All that is necessary now to decide, as we do decide, is that in a capital case where the defendant is unable to employ counsel, and is incapable of adequately making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the Court, whether requested or not, to assign coun-

> sel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time, or under such circumstances as preclude the giving of effective aid in the preparation for the trial of the case. * * * In a case such as this, whatever may be the rule in other cases, the right to have counsel appointed when necessary is a logical corollary from the constitutional right to be heard by counsel."

The above statement in and of itself should be a sufficient refutation of the claim that the case decided that the Fourteenth Amendment in all cases requires an appointment of counsel for indigent prisoners. Further comments by this Court show that the *Powell* case did not decide so broad a proposition.

In *Palko v. Conn.*, 302 U. S. 319, Mr. Justice Cardozo said, at page 328:

> "For that reason, ignorant defendants in a capital case were held to have been condemned unlawfully when in truth though not in form, they were refused the aid of counsel. * * * The decision did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a Federal Court. Their decision turned upon the fact that in the particular situation laid before us in the evidence, the benefit of counsel was essential to the substance of a hearing."

So also, Mr. Justice Roberts, in his dissenting opinion in *Snyder v. Mass.*, 291 U. S. 97, concurred in by Justices Brandeis, Sutherland and Butler, said at page 128:

> "And this Court has recently decided that in the trial of a *capital* offense, due process includes the right of the accused to be represented by counsel." (Italics supplied.)

In *Boyd v. O'Grady*, 121 Fed. 2d 146, the Court states in broad terms:

> "The procedural guarantee of the Sixth Amendment to the Federal Constitution is protected against State invasion through the Fourteenth Amendment."

But, in view of the comments of this Court, above quoted, this dictum cannot be sustained. This question is fully discussed by Judge Chesnut in *Gall v. Brady, supra*, and *Carey v. Brady, supra*, in which Judge Chesnut held that the absence of counsel is only an element of due process of law, and does not give grounds for reversal in and of itself where the trial was otherwise fairly conducted. This case was appealed to the United States Circuit Court of Appeals for the Fourth Circuit, and was decided on January 12, 1942, by a per curiam opinion, as heretofore stated. No formal opinion was written because

> "one member of the Court is of the opinion that the mere failure of the State Court, upon request, to appoint counsel for an indigent prisoner does not amount to a denial of due process in the absence of other circumstances showing that such appointment is necessary to a fair trial, such as the youth and experience of the prisoner or complicated nature of the charge, the inflamed state of the public mind, acts of oppression on the part of public officers, etc., and that if such failure to appoint counsel should be held to be a denial of due process, it is not such a denial as would destroy the jurisdiction of the Court to proceed with the trial of the case. Another member of the Court is of the view that such failure to appoint counsel is a denial of due process that would justify a reversal of the judgment upon appeal but is not sufficient of itself to destroy the jurisdiction of the Court and authorize the release of the prisoner, after sentence on habeas corpus. The third member of the Court is of the opinion that such a failure is of itself a denial of due process that destroys the jurisdiction of the Court and entitles the prisoner to release on habeas corpus."

This Court has, of course, held that where a Federal Court having general jurisdiction has failed to appoint counsel for a prisoner upon request, his constitutional right to the assistance of counsel guaranteed by the Sixth Amendment of the United States Constitution has been denied, and that such denial constitutes error and the conviction becomes a nullity. *Johnson v. Zerbst*, 304 U. S. 458. This decision, however, is not one under the Fourteenth Amendment and is binding only on the Federal Courts. That there is a distinction between the principle established by *Johnson v. Zerbst, supra*, under the Sixth Amendment and the rule as to counsel, binding on the State Courts under the Fourteenth Amendment, is shown by the recent language of this Court in *Glasser et al., v. U. S.*, — U. S. —, 86 Law Ed. 405. There, it was said:

> "The guarantees of the Bill of Rights are the protecting bulwarks against the reach of arbitrary power. Among those guarantees is the right granted by the Sixth Amendment to an accused in a criminal proceeding in a federal court 'to have the assistance of counsel for his defense.' 'This is one of the safeguards deemed necessary to insure fundamental human rights of life and liberty' and a federal court cannot constitutionally deprive an accused whose life or liberty is at stake of the assistance of counsel. *Johnson v. Zerbst*, 304 U. S. 458, 462, 463. Even as we have held that the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment, *Powell v. Alabama*, 287 U. S. 45, so are we clear that the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and

> unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired."

The above statement clearly shows that the failure of a State Court to appoint counsel is only an element of due process to be considered as a means of determining whether or not a prisoner in a given instance has had a fair trial.

This Court has, of course, said in certain other State cases, heretofore cited, that the appointment of counsel was essential to a fair hearing, and the Petitioner will presumably argue that in the present case, such appointment is also necessary. This, however, is to fall into the same pitfall mentioned by Mr. Justice Cardozo in *Snyder v. Mass., supra*, when he said, at page 114:

> "A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment, a Court founds a rule which is general in form though it has been wrought under the pressure of particular situations. Furthermore, another situation is placed under the rule because it is fitted to the words though related faintly if at all to the reasons that brought the rule into existence."

Here, as in that case, the Petitioner seeks, by the application of a mechanical formula to bring himself within a rule laid down by this Court under totally different circumstances and now claims a reversal of the judgment of the Trial Court because no counsel was appointed for him. The case of *Wilson v. Lanagan, Warden*, 99 Fed. 2d 544, cert. den. 306 U. S. 634, holds to the contrary. In that case, on a charge of smuggling weapons into a Massa-

chusetts jail to aid a prisoner in escaping, the prisoner before trial asked that counsel be appointed for him, but was informed by the Trial Judge that while he could not assign counsel, except in capital cases, the Sheriff would notify any counsel whom he wished to defend him, and would also notify any witnesses that he desired to be summoned. After conviction, the prisoner applied to the Federal District Court of Massachusetts for a writ of habeas corpus on the ground that he had been deprived of a fair trial under the due process clause of the Fourteenth Amendment. The District Court dismissed the writ. Its action was affirmed by the Circuit Court of Appeals and on February 6, 1939, nearly nine months after the decision in *Johnson v. Zerbst, supra,* this Court denied certiorari. *Powell v. Ala., supra,* was distinguished in the opinion of the District Judge, 19 Fed. Sup. 870, 873.

If the case of *Wilson v. Lanagan, supra,* be not treated as binding, the point here involved must be approached as an open question. It is quite clear that "if recognition of the right of a defendant charged with a felony to have the aid of counsel depended upon the existence of a similar right at common law as it existed in England when our Constitution was adopted, there would be great difficulty in maintaining it as necessary to due process" (*Powell v. Ala., supra,* page 60), for even the right to be heard by counsel in felony cases was not permitted in England until 1836. It is also quite clear that the provisions contained in the Sixth Amendment of the Federal Constitution, cited in *Powell v. Ala.,* were adopted to do away with this common law rule in the Federal Courts. But even the failure of a Federal Court to appoint counsel for an indigent prisoner was not considered until the decision in *Johnson v. Zerbst, supra,* to have the effect of nullifying the Court's jurisdiction to hear and determine the issue. (See opin-

ion of Judge Chesnut in *Gall v. Brady, supra.*) Since the decision in that case, the rule has been established for such Courts. It is quite clear, however, that the Sixth Amendment has no application to the State Courts, and that if there be such a requirement as to the States, it is only because it is an element of an ordered concept of the administration of justice. *Powell v. Ala., supra,* pages 67 and 68. But, is the appointment of counsel for an indigent prisoner such an element? Certainly, it has not been so considered in Maryland. Section 7 of Article 26 of the Annotated Code of Maryland, provides as follows:

> "The circuit courts for the several counties and the criminal court of Baltimore may appoint assistant counsel for the State, to aid in the trial of criminal or other State cases in said courts, whenever in the judgment of the court in which any such case is pending public interest requires it; and the said courts may likewise appoint counsel to defend any person in the trial of any criminal case in said courts whenever in the judgment of the court in which any such case is pending a just regard for the rights of the accused requires it."

This Section was originally adopted by Chapter 19 of the Acts of 1856, and was amended by Chapter 46 of the Acts of 1886. The Act of 1856 contained no statutory provision for the appointment of counsel for indigent prisoners, and it is only from the amendment of 1886 that the Maryland Courts' statutory authority to make such appointment is derived. It clearly shows that the policy of the State of Maryland has been to leave to the discretion of its trial courts the question of whether counsel in any type of criminal case, capital or otherwise, should be appointed. The Petitioner would have this Court free a prisoner convicted by the Courts of the State of Maryland

according to procedure established in this State at least since 1886, and with no charge that he was denied notice, an opportunity to be heard or a fair trial, but merely because the trial court, though requested, did not appoint counsel for him. Does the Fourteenth Amendment compel such a result?

A long line of decisions of this Court has held that the Fourteenth Amendment does not compel the adoption by the States of any particular form of criminal procedure. The State may abolish presentment or indictment by the Grand Jury as a pre-requisite to the prosecution of a criminal offense. *Hurtado v. California*, 110 U. S. 516, *Snyder v. Mass., supra.* It does not require that a State shall provide for an appellate review in criminal cases. *Reetz v. Mich.*, 188 U. S. 505, *McKane v. Durston*, 153 U. S. 684. The right to be confronted by witnesses contained in the Sixth Amendment is not guaranteed as against action by the State by the due process clause of the Fourteenth Amendment. *West v. Louisiana*, 194 U. S. 258. Trial by jury guaranteed by the Sixth Amendment is not protected from State action by the Privileges and Immunities clause or the due process clause of the Fourteenth Amendment, *Maxwell v. Dow*, 176 U. S. 581. The exemption from compulsory self-incrimination guaranteed by the Fifth Amendment is not protected by either the due process of laws or the Privileges and Immunities clause of the Fourteenth Amendment from abridgement by the State, *Twining v. New Jersey*, 211 U. S. 78. A State statute permitting appeals in criminal cases to be taken by the State with the consent of the trial judge is not an infringement of the due process provisions of the Fourteenth Amendment, *Palko v. Conn., supra.* Mr. Justice Cardozo, in the *Palko* case, *supra*, has enumerated the various instances in which the States have been permitted to do away with established

forms of procedure in criminal cases (on this point see also, *Frank v. Mangum*, 237 U. S. 309), together with those instances in which the Fourteenth Amendment has been held to be a prohibition, and he states, at page 325:

> "The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' * * * Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them."

Has the "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" been violated in the present case?

As has been heretofore noted, the Petitioner has stated the question here in controversy to be whether the Fourteenth Amendment requires the appointment of counsel for indigent prisoners charged in the State Court with crimes less than capital. The Petitioner will quite logically argue that the need for counsel is no less where a prisoner faces imprisonment than where he faces death, and this, of course, is logically true. However, the Petitioner will hardly contend that in every instance in which life, liberty or property protected by the Fourteenth Amendment is involved, counsel must be appointed. He certainly will not contend that the Fourteenth Amendment requires a magis-

trate hearing traffic violations to appoint counsel for a person charged with exceeding the speed limit merely because such a person is a pauper and requests such appointment even though a conviction will subject that person to imprisonment. Nor will he contend, in a condemnation case, where the owner of the property is shown to be unable to employ counsel, that counsel should be appointed by the State. To carry the logic of the Petitioner's argument to its absurdity, will it be contended that, in a civil case in replevin, property rights in the article replevied being involved, the Court must appoint counsel for an indigent defendant? Will it be contended that even where a person is given a preliminary hearing before a committing magistrate or a United States Commissioner, such magistrate or commissioner must appoint counsel if the prisoner is indigent and requests it? And yet, the right to be heard by counsel as distinguished from the right to the appointment of counsel is guaranteed at every stage of the proceedings, even as to preliminary hearings. See annotation in 84 Law Ed. pages 389-392.

The logic of the Petitioner's argument certainly compels the appointment of counsel at such preliminary hearings since he makes no distinction between the right to such appointment and the right to be heard by counsel, and this logic has been applied by the United States Court of Appeals for the District of Columbia in the case of *Wood v. U. S.*, decided March 9, 1942. Such a ruling effective as against the States, would be extremely difficult to administer in view of the large number of cases either originating before Magistrates and Justices of the Peace by way of preliminary hearing, or actually triable by them.

These instances are, therefore, cited to show that even the logic of the Petitioner's argument requires a line to be drawn somewhere in this type of case. It may be con-

tended that the right to the appointment of counsel is limited to capital cases and felonies, but this line would not be practical in Maryland, and it may well be, in other States, for "the distinction made in some jurisdictions that crimes punishable by death or confinement in the penitentiary are felonies, and others misdemeanors, has never existed in this State, but here, only those are felonies which were such at common law or have been declared so by statute." *Dutton v. State*, 123 Md. 373. For instance, the larceny of dogs or cats in this State is a felony yet a conviction for it is subject to confinement in jail for not mor than three months, Section 393 of Article 27 of the Annotated Code of Maryland (1939 Ed.),[1] while a violation of certain of the motor vehicle laws of Maryland providing a fine of $5,000 and imprisonment for five years is merely a misdemeanor, triable before a magistrate under Section 204 of Article 56 of the Annotated Code of Maryland (1939 Ed.), as amended by Chapter 13 of the Acts of 1941.[2] *Dougherty v. Superintendent, etc.*, 144 Md. 204. These instances are only cited to show the anomalies that may result from an application of the mechanical rule advocated by the Petitioner.

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[1] Every person convicted of feloniously taking and carrying away any dog, bitch, or cat, or as accessory thereto before or after the fact shall be deemed guilty of the crime of larceny, and shall restore the dog, bitch, or cat, to the owner thereof, or shall pay to him the value thereof, and shall be sentenced to confinement in jail for not more than three months.

[2] Any person who shall knowingly make any false statement, either in his application for the ownership certificate herein provided for or in any assignment thereof, or who, with intent to procure or pass title to a motor vehicle, which he knows or has reason to believe has been stolen, shall receive or transfer possession of the same from or to another, or who shall operate or be an occupant of any motor vehicle he knows or has reason to believe has been stolen, and any person who shall intentionally make any false statement or misrepresentation either orally or in writing to said Commissioner of Motor Vehicles, or to any of his deputies or employees, or to any other person whatsoever for the purpose of securing a certificate of title or a transfer or assignment of such certificate of title to himself or to some other person, shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than five hundred dollars ($500.00) nor more than five thousand dollars ($5,000.00) or by imprisonment for not more than five (5) years, or by both fine and imprisonment, in the discretion of the court.

It is to be noted that there is no statute of Maryland here involved that has provided that the State Court shall not appoint counsel for indigent defendants in cases of this nature. The State Court merely did not appoint counsel in this case, and the Petitioner claims that he should be released because the Constitution has been violated. A proper approach to this question has been stated by Mr. Justice Cardozo in *Snyder v. Mass., supra*, at page 115:

> "What we are subjecting to revision is not the action of a Legislature excluding a defendant from appeal at all times or in all conditions. What is here for revision is the action of the judicial department of a State excluding the defendant in a particular set of circumstances and the justice or injustice of that exclusion must be determined in the light of the whole record."

The Petitioner is compelled to admit that there is nothing in the Fourteenth Amendment specifically stating that the mere omission to appoint counsel nullifies the sentence of a State Court of general jurisdiction, and in this connection, Mr. Justice Cardozo also in *Snyder v. Mass., supra*, said:

> "True indeed it is that constitutional privileges or immunities may be conferred so explicitly as to leave no room for an inquiry whether prejudice to a defendant has been wrought through their denial. In saying this we put aside cases within the rule of de minimis. If the defendant in a federal court were to be denied the opportunity to be confronted with the 'witnesses against him', the denial of the privilege would not be overlooked as immaterial because the evidence thus procured was persuasive of the defendant's guilt. In the same way, privileges, even though not explicit, may be so obviously fundamental as to bring us to the same result. A defendant who has been denied an opportunity to be heard in his defense has lost something indispensable, however, convincing the ex parte showing. But here, in the case at hand, the privilege, if it

exists, is not explicitly conferred, nor has the defendant been denied an opportunity to answer and defend. The Fourteenth Amendment has not said in so many words that he must be present every second or minute or even every hour of the trial. If words so inflexible are to be taken as implied, it is only because they are put there by a court, and not because they are there already, in advance of the decision. Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. It is fairness with reference to particular results. 'The due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall.'"

The Respondent maintains that the appointment of counsel in this case was not so obviously fundamental as to require this Court to reverse the judgment of the trial court. It has been shown that fundamental justice does not require the appearance of counsel in all cases where life, liberty or property are involved. Nor has the presence of counsel been found to be necessary in every instance to protect the prisoner from doing an act that may place his life or liberty in jeopardy. The Petitioner admits, as he must admit, under the rule in *Johnson v. Zerbst, supra*, that a prisoner may knowingly and understandingly plead guilty to an indictment without the benefit of the advice of counsel, and yet, how can he as a layman know whether the indictment contains technical defects that may invalidate it, and give him his freedom?

It would seem that the rule here should be that the appointment of counsel is a necessary element of due process only to the extent that a fair and just hearing would be thwarted by the failure to appoint counsel and to that ex-

tent only, just as it was held in *Snyder v. Mass., supra,* that the presence of the accused at a trial is a necessary element of due process only to the extent that a fair and just hearing would be thwarted by his absence and to that extent only. Cf. *Lisenba v. Calif.*, — U. S. —, 86 L. Ed. 179; *Hysler v. Fla.*, — U. S. —, 86 L. Ed. 585. 39 Harvard Law Review 431.

(b) Is the judgment of a State court convicting a prisoner of a crime less than capital void where the prisoner is indigent and unable to procure counsel, and where the State court, though requested, declined to appoint counsel for him?

Even though it be held that the trial court erred in declining to appoint counsel for the Petitioner in this case, it does not necessarily follow that the sentence imposed was void so as to entitle the Petitioner to attack the judgment collaterally through the writ of habeas corpus. As pointed out in the opinion of Chief Judge Bond (R. 28), under the decisions of the Court of Appeals of this State, the contention of the petitioner is not a proper ground for action on a writ of habeas corpus, an appeal being the proper method. This would have been an adequate non-Federal ground for not releasing the prisoner. *Herndon v. Lowry*, 301 U. S. 242, 247. The point, however, raised by the Petitioner was considered by Chief Judge Bond because he was in doubt as to whether the Fourteenth Amendment required him to consider it by making the sentence of the trial court void by reason of its having lost jurisdiction through its refusal to appoint counsel for the Petitioner. The trial court, however, was admittedly a court of general jurisdiction of the State of Maryland, and admittedly had jurisdiction over the prisoner. In view of this situation, therefore, the trial court had jurisdiction to decide the question raised by the Petitioner, so that it can hardly be said that its judgment in deciding the question

by refusing to appoint counsel was void for want of jurisdiction. It is true that this Court held in *Johnson v. Zerbst, supra*, that a writ of habeas corpus would lie in a Federal Court where a Federal Court failed to appoint counsel for indigent prisoners. This decision is based upon the provisions of the Federal statutes relating to habeas corpus and authorizing the issuance of the writ where a prisoner is confined in violation of the Constitution of the United States. These statutes, however, have not always been applied where a prisoner is confined by virtue of a judgment of a State court, even though the prisoner claims his confinement to be in violation of the Federal Constitution. For instance, it has been held by this Court that a judgment of a State court is not void even though a prisoner claims that he is confined after a trial in a State court in which persons of his race were arbitrarily excluded, solely because of their race, from the panel of jurors, and because the State court denied him the right to establish that fact by competent proof. *Andrews v. Swartz*, 156 U. S. 272. See also *In re Wood*, 140 U. S. 278; *In re Jugiro*, 140 U. S. 291. It has been held, of course, that where murderers are rushed to conviction through counsel, jury and judge being swept to such an end by an irresistable wave of public passion, so that no trial in the true sense was afforded them, such judgment of conviction is void for want of due process. *Moore v. Dempsey*, 261 U. S. 86. But that is not the situation here presented. It would be an anomolous situation to hold the trial of the Petitioner in the case at bar void for want of jurisdiction because of the refusal to appoint counsel, when a judgment entered upon the verdict of a jury chosen through discrimination against race or color is immune from collateral attack.

General Importance of Particular Case.

If the principle contended for that a criminal trial in a state court is *without jurisdiction* by reason of the non-appointment of counsel for the defendant, the consequences will be great and far reaching and will amount in effect to a general gaol delivery of state prisoners.

The particular case is not an isolated one. The Maryland law and practice authorizes the judge to appoint counsel for indigent defendants wherever that is required by a general regard for the rights of the accused. The Maryland practice generally is shown in the case of *Gall v. Brady, supra.* It has long been the invariable practice to appoint counsel in capital cases, and it is very generally the practice in Baltimore City and many of the separate Counties in Maryland, to appoint counsel where the seriousness of the crime charged or the other circumstances indicate that it is necessary to do so to have the substance of a fair trial. But in the last 50 years there have been thousands of cases tried in Maryland criminal courts where indigent defendants were not represented by counsel and there are probably hundreds of prisoners now in Maryland penal institutions as a result of criminal trials without counsel. In this respect Maryland is not unique and the same situation probably exists in most if not all of the other States. This consideration is not imaginary. If the principle contended for is established we may confidently anticipate a perfect flood of applications to the federal and state courts for the release of prisoners on habeas corpus.

With respect to what constitutes due process, in relation to the appointment of counsel for indigent defendants, the distinction is not to be sharply drawn between capital and non-capital cases. We have shown that the rule contended for by the Petitioner has only been adverted to in capital

cases, but even in those cases there were other circumstances present. Where the substance of a fair trial has been denied it is immaterial whether the criminal charge is great or trivial. Due process means a fair trial free from oppressive circumstances such as mob influence, great public indignation, lack of independence of the trial judge or unfair and oppressive conduct of prosecuting officers. Given the existence of such conditions, it is correct to say that the trial is a nullity and that the court lacked real judicial jurisdiction. But where the trial is free and fair and the rights of the accused are recognized and respected and the conviction is the result of evidence adduced by the government without fraud or pressure, it is quite incorrect to say that the court was without jurisdiction merely because the accused did not have counsel appointed by the court at public expense. There is no authority for such a proposition at common law in the state courts or in the federal courts in reviewing state convictions.

The only Supreme Court cases reviewing state convictions and releasing the prisoners are *Powell v. Alabama, supra*, *Boyd v. O'Grady, supra*, and *Moore v. Dempsey, supra*. None is authority for the principle here contended for. All depended on special facts and circumstances which showed the accused did not have the substance of a fair trial. That a mere non-appointment of counsel by itself was not the determining factor in *Powell v. Alabama* appears from the fact that counsel were indeed there appointed. Nor does *Johnson v. Zerbst*, a federal case, establish the principle contended for. While there is some general language in the opinion to the effect that the failure to appoint counsel deprives the court of jurisdiction, it will be noted from the case as a whole that the prisoners were denied fair opportunity to obtain counsel especially with respect to their desired appeal. The case, therefore, stands on its own facts.

Probably the best recent review of the subject matter, even for federal criminal cases, is the opinion of Judge Sibley of the Fifth Circuit, in *Sanford v. Robbins*, 115 F. 2nd 435, cert. denied 312 U. S. 697.

The true principle to be emphasized is—

> "that appointment of counsel is a necessary element of due process only in those cases where such appointment appears *from the circumstances of the case* to be necessary to a fair and just hearing, and a denial of due process cannot be predicated upon nothing more than the failure of the court to make such appointment."

The meaning of due process under the 14th Amendment (irrespective of the 6th Amendment) is that the hearing must be a real one, not a sham or a pretense. It is the *substance* of a fair trial which is required for due process.

Where the trial is otherwise free and fair the non-appointment of counsel for an indigent defendant does not constitute lack of due process. Where the defendant is without counsel the common law required the judge to represent the accused to the extent of seeing that he gets his legal rights and is not convicted unlawfully, and the judge may assist in questioning the witnesses. Where the accused has no counsel this is still the common practice. *Sanford v. Robbins, supra.*

A habeas corpus court cannot grant a new trial which is the just remedy for errors and it ought not lightly to release those who have been found guilty.

To hold that the appointment of counsel is essential to due process in every case would be for the federal courts to substitute their view of what is desirable in the trial of criminal cases in most if not all the states in the Union and to force the states to revise their trial machinery to

meet a change in the concept of due process out of harmony with their practice and the decisions of other courts. See *Snyder v. Massachusetts, supra,* and the more recent case of *Lisenba v. California, supra.*

Release upon habeas corpus amounts to more than the exercise of appellate jurisdiction by federal courts or the state tribunals. It amounts to nullification of their proceedings by the federal courts on the theory that the proceedings have been so unfair as to amount to a denial of due process, and should be exercised only in extreme cases.

CONCLUSION.

For these reasons, therefore, the Respondent respectfully maintains that the Order of the Honorable Carroll T. Bond should be affirmed.

Respectfully submitted,

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op. 4, 5, 6, dissent

SUPREME COURT OF THE UNITED STATES.

No. 887.—October Term, 1941.

Smith Betts, Petitioner, *vs.* Patrick J. Brady, Warden of the Penitentiary of Maryland.	On Writ of Certiorari to Hon. Carroll T. Bond, a Judge of the State of Maryland, being a Judge of the Court of Appeals of Maryland from the City of Baltimore.

[June 1, 1942.]

Mr. Justice Roberts delivered the opinion of the Court.

The petitioner was indicted for robbery in the Circuit Court of Carroll County, Maryland. Due to lack of funds, he was unable to employ counsel, and so informed the judge at his arraignment. He requested that counsel be appointed for him. The judge advised him that this would not be done as it was not the practice in Carroll County to appoint counsel for indigent defendants save in prosecutions for murder and rape.

Without waiving his asserted right to counsel the petitioner pleaded not guilty and elected to be tried without a jury. At his request witnesses were summoned in his behalf. He cross-examined the State's witnesses and examined his own. The latter gave testimony tending to establish an alibi. Although afforded the opportunity, he did not take the witness stand. The judge found him guilty and imposed a sentence of eight years.

While serving his sentence, the petitioner filed with a judge of the Circuit Court for Washington County, Maryland, a petition for a writ of *habeas corpus* alleging that he had been deprived of the right to assistance of counsel guaranteed by the Fourteenth Amendment of the federal Constitution. The writ issued, the cause was heard, his contention was rejected, and he was remanded to the custody of the prison warden.

Some months later a petition for a writ of *habeas corpus* was presented to Hon. Carroll T. Bond, Chief Judge of the Court of Appeals of Maryland, setting up the same grounds for the prisoner's release as the former petition. The respondent answered, a hearing was afforded, at which an agreed statement of facts was

offered by counsel for the parties, the evidence taken at the petitioner's trial was incorporated in the record, and the cause was argued. Judge Bond granted the writ but, for reasons set forth in an opinion, denied the relief prayed and remanded the petitioner to the respondent's custody.

The petitioner applied to this court for certiorari directed to Judge Bond. The writ was issued on account of the importance of the jurisdictional questions involved and conflicting decisions[1] upon the constitutional question presented. In awarding the writ we requested counsel to discuss the jurisdiction of this court, "particularly (1) whether the decision below is that of a court within the meaning of § 237[2] of the Judicial Code, and (2) whether state remedies, either by appeal or by application to other judges or any other state court, have been exhausted."

1. Sec. 237 of the Judicial Code declares this court competent to review, upon certiorari, "any cause wherein a final judgment . . . has been rendered . . . by the highest court" of a state "in which a decision could be had" on a federal question. Was Judge Bond's judgment that of a court within the meaning of the statute? Answer must be made in the light of the applicable law of Maryland.

Art. 4, § 6 of the State Constitution provides: "All Judges shall by virtue of their offices be Conservators of the Peace throughout the State;" . . . Sec. 1 of Art. 42 of the Public General Laws of Maryland (Flack's 1939 Edition) invests the Court of Appeals and the Chief Judge thereof, the Circuit Courts for the respective counties, and the several judges thereof, the Superior Court of Baltimore City, the Court of Common Pleas of that city, the Circuit Court and Circuit Court No. 2 of Baltimore City, the Baltimore City Court, and the judges of the said courts, out of court, and the Judge of the Court of Appeals from the City of Baltimore, with power to grant writs of *habeas corpus* and to exercise jurisdiction in all matters pertaining thereto.

Although it is settled that the grant to the Court of Appeals of the power to issue the writ is unconstitutional and void,[3] and al-

[1] In re McKnight, 52 Fed. 799; Wilson v. Lanagan, 99 F. 2d 544; Boyd v. O'Grady, 121 F. 2d 146; Carey v. Brady, 125 F. 2d 253; Comm. *ex rel.* Schultz v. Smith, 139 Pa. Super. Ct. 357, 11 A. 2d 656; Comm. *ex rel.* McGlinn v. Smith, 344 Pa. 41, 24 A. 2d 1.

[2] 28 U. S. C. § 344(b).

[3] State v. Glenn, 54 Md. 572, 596; Sevinskey v. Wagus, 76 Md. 335.

though the statute does not confer on individual judges of the Court of Appeals the power to issue a writ and proceed thereon, nevertheless, those judges, as conservators of the peace, have the power under the quoted section of the Constitution.[4] In any event, Judge Bond is the Chief Judge of the Court of Appeals and the judge of that court from the City of Baltimore and, as such, is empowered to act.

Sections 2 to 6, inclusive, 9 to 12 inclusive, and 17 of the statute prescribe the procedure governing the issue of the writ, its service, the return, and the hearing. No question is made but that Judge Bond complied with these provisions. It is, therefore, apparent that in all respects he acted in a judicial capacity and that, in his proper person, he was a judicial tribunal having jurisdiction, upon pleadings and proofs, to hear and to adjudicate the issue of the legality of the petitioner's detention. If Judge Bond had been sitting in term time as a member of a court, clothed with power to act as one of the members of that court, his judgment would be that of a court within the scope of § 237. Doubt that his judgment in the present instance is such arises out of our decision in *McKnight* v. *James*, 155 U. S. 685, where we refused to review the denial of a discharge by a judge of an inferior court of Ohio who issued the writ and heard the case at chambers. It appeared that the petitioner had addressed his petition to a judge of the Circuit Court instead of the court itself and that, for this reason, the order of the judge was not reviewable by the Supreme Court of Ohio as it would have been had the writ been addressed to the Circuit Court though heard by a single judge. The petitioner had not exhausted his state remedy since, though he could have obtained a decision by the highest court of the state, he had avoided doing so, and then sought to come to this court directly from the order of the Circuit judge on the theory that that judge's order was the final order of the highest court of the state which could decide his case. In a later decision we referred to this and other cognate cases as deciding that appeals do not lie to this court from orders by judges at chambers,[5] but the fundamental reason for denying our jurisdiction was that the appellant had not exhausted state remedies.

In view of what has been said of the power of Judge Bond as a judicial tribunal to hear and finally decide the cause, and of the

[4] Ex parte O'Neill, 8 Md. 227; Ex parte Maulsby, 13 Md. 625.

[5] Craig v. Hecht, 263 U. S. 255, 276.

judicial quality of his action, we are of opinion that his judgment was that of a court within the intendment of Sec. 237.

2. Did the judgment entered comply with the requirement of Sec. 237 that it must be a final judgment rendered by the highest court in which a decision could be had? Again answer must be made in the light of the applicable law of Maryland. The judgment was final in the sense that an order of a Maryland judge in a *habeas corpus* case, whatever the court to which he belongs, is not reviewable by any other court of Maryland except in specific instances named in statutes which are here inapplicable.[7] It is true that the order was not final, and the petitioner has not exhausted state remedies in the sense that in Maryland, as in England, in many of the states, and in the federal courts, a prisoner may apply successively to one judge after another and to one court after another without exhausting his right.[8] We think this circumstance does not deny to the judgment in a given case the quality of finality requisite to this court's jurisdiction. Although the judgment is final in the sense that it is not subject to review by any other court of the State, we may, in our discretion, refuse the writ when there is a higher court of the State to which another petition for the relief sought could be addressed,[6] but this is not such a case. To hold that, since successive applications to courts and judges of Maryland may be made as of right, the judgment in any case is not final, would be to deny all recourse to this court in such cases.

Since Judge Bond's order was a final disposition by the highest court of Maryland in which a judgment could be had of the issue joined on the instant petition we have jurisdiction to review it.

3. Was the petitioner's conviction and sentence a deprivation of his liberty without due process of law, in violation of the Fourteenth Amendment, because of the court's refusal to appoint counsel at his request?

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[6] Bell v. State, 4 Gill, 301; Ex parte O'Neill, 8 Md. 227; In re Coston, 23 Md. 271; Coston v. Coston, 25 Md. 500; State v. Glenn, 54 Md. 572; Annapolis v. Howard, 80 Md. 244; Petition of Otho Jones, 179 Md. 240.

[7] Judge Bond intimates that § 3 of Art. 42, as amended by Laws 1941, c. 484 permits the use of a rule to show cause (cf. Holiday v. Johnston, 313 U. S. 342) or other form of preliminary inquiry to avoid the necessity of the issue of a writ and a hearing where a redundant petition is filed disclosing no new matter. See, Salinger v. Loisel, 265 U. S. 224, 231-232. He determined, however, in this case to issue the writ and afford a hearing.

[8] Tenner v. California, No. 713, Oct. T. 1941.

The Sixth Amendment of the national Constitution applies only to trials in federal courts.[9] The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment[10] although a denial by a state of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth.[11] Due process of law is secured against invasion by the federal Government by the Fifth Amendment and is safeguarded against state action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.[12] In the application of such a concept there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed.

The petitioner, in this instance, asks us, in effect, to apply a rule in the enforcement of the due process clause. He says the rule to be deduced from our former decisions is that, in every case, whatever the circumstances, one charged with crime, who is unable to obtain counsel, must be furnished counsel by the state. Expressions in the opinions of this court lend color to the argu-

[9] United States v. Dawson, 15 How. 467, 487; Twitchell v. Pennsylvania, 7 Wall. 321, 325; Spies v. Illinois, 123 U. S. 131, 166; In re Sawyer, 124 U. S. 200, 219; Brooks v. Missouri, 124 U. S. 394, 397; Eilenbecker v. District Court, 134 U. S. 31, 34, 35; West v. Louisiana, 194 U. S. 258, 263; Howard v. Kentucky, 200 U. S. 164, 172.

[10] Hurtado v. California, 110 U. S. 516; Maxwell v. Dow, 176 U. S. 581; West v. Louisiana, 194 U. S. 258; Twining v. New Jersey, 211 U. S. 78; Frank v. Mangum, 237 U. S. 309; Snyder v. Mass., 291 U. S. 97; Palko v. Conn., 302 U. S. 319.

[11] Compare Twining v. New Jersey, 211 U. S. 78, 98; Powell v. Alabama, 287 U. S. 45; Palko v. Connecticut, 302 U. S. 319, 323 ff.

[12] Compare Lisenba v. California, Nos. 4 & 5 Oct. T. 1941, Slip opinion, p. 13; 86 L. Ed. 179, 189.

ment,[13] but, as the petitioner admits, none of our decisions squarely adjudicates the question now presented.

In *Powell* v. *Alabama*, 287 U. S. 45, ignorant and friendless negro youths, strangers in the community, without friends or means to obtain counsel, were hurried to trial for a capital offense without effective appointment of counsel on whom the burden of preparation and trial would rest, and without adequate opportunity to consult even the counsel casually appointed to represent them. This occurred in a State whose statute law required the appointment of counsel for indigent defendants prosecuted for the offense charged. Thus the trial was conducted in disregard of every principle of fairness and in disregard of that which was declared by the law of the State a requisite of a fair trial. This court held the resulting convictions were without due process of law. It said that, in the light of all the facts, the failure of the trial court to afford the defendants reasonable time and opportunity to secure counsel was a clear denial of due process. The court stated further that "under the circumstances, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment was also a denial of due process", but added: "whether this would be so in other criminal prosecutions or under other circumstances, we need not determine. All that it is necessary now to decide, as we do decide, is that, in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law;" . . .

Likewise, in *Avery* v. *Alabama*, 308 U. S. 444, the state law required the appointment of counsel. The claim which we felt required examination, as in the *Powell* case, was that the purported compliance with this requirement amounted to mere lip service. Scrutiny of the record disclosed that counsel had been appointed and the defendant had been afforded adequate opportunity to prepare his defense with the aid of counsel. We, therefore, overruled the contention that due process had been denied.

In *Smith* v. *O'Grady*, 312 U. S. 329, the petition for *habeas corpus* alleged a failure to appoint counsel but averred other facts

[13] Powell v. Alabama, 287 U. S. 45, 73; Grosjean v. American Press Co., 297 U. S. 233, 243, 244; Johnson v. Zerbst, 304 U. S. 458, 462; Avery v. Alabama, 308 U. S. 444, 447.

which, if established, would prove that the trial was a mere sham and pretense, offensive to the concept of due process. There also, state law required the appointment of counsel for one on trial for the offence involved.

Those cases, which are the petitioner's chief reliance, do not rule this. The question we are now to decide is whether due process of law demands that in every criminal case, whatever the circumstances, a state must furnish counsel to an indigent defendant. Is the furnishing of counsel in all cases whatever dictated by natural, inherent, and fundamental principles of fairness? The answer to the question may be found in the common understanding of those who have lived under the Anglo-American system of law. By the Sixth Amendment the people ordained that, in all criminal prosecutions, the accused should "enjoy the right . . . to have the assistance of counsel for his defence." We have construed the provision to require appointment of counsel in all cases where a defendant is unable to procure the services of an attorney, and where the right has not been intentionally and competently waived.[14] Though, as we have noted, the amendment lays down no rule for the conduct of the states, the question recurs whether the constraint laid by the amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the states by the Fourteenth Amendment. Relevant data on the subject are afforded by constitutional and statutory provisions subsisting in the colonies and the states prior to the inclusion of the Bill of Rights in the national Constitution, and in the constitutional, legislative, and judicial history of the states to the present date. These constitute the most authoritative sources for ascertaining the considered judgment of the citizens of the states upon the question.

The Constitutions of the thirteen original states, as they were at the time of federal union, exhibit great diversity in respect of the right to have counsel in criminal cases. Rhode Island had no constitutional provision on the subject until 1843, North Carolina and South Carolina had none until 1868. Virginia has never had any. Maryland, in 1776, and New York, in 1777, adopted provisions to the effect that a defendant accused of crime should be "allowed" counsel. A constitutional mandate that the accused should have a right to be heard by himself and by his counsel

[14] Johnson v. Zerbst, 304 U. S. 458.

was adopted by Pennsylvania in 1776, New Hampshire in 1774, by Delaware in 1782, and by Connecticut in 1818. In 1790 Massachusetts ordained that the defendant should have the right to be heard by himself or his counsel at his election. In 1798 Georgia provided that the accused might be heard by himself or counsel or both. In 1776 New Jersey guaranteed the accused the same privileges of witnesses and counsel as their prosecutors "are or shall be entitled to."

The substance of these provisions of colonial and early state constitutions is explained by the contemporary common law. Originally in England a prisoner was not permitted to be heard by counsel upon the general issue of not guilty on any indictment for treason or felony.[15] The practice of English judges, however, was to permit counsel to advise with a defendant as to the conduct of his case and to represent him in collateral matters and as respects questions of law arising upon the trial.[16] In 1695 the rule was relaxed by statute[17] to the extent of permitting one accused of treason the privilege of being heard by counsel. The rule forbidding the participation of counsel stood, however, as to indictments for felony, until 1836, when a statute accorded the right to defend by counsel against summary convictions and charges of felony.[18] In misdemeanor cases and, after 1695, in prosecutions for treason, the rule was that the defense must be conducted either by the defendant in person or by counsel, but that both might not participate in the trial.[19]

In the light of this common law practice, it is evident that the constitutional provisions to the effect that a defendant should be "allowed" counsel or should have a right "to be heard by himself and his counsel", or that he might be heard by "either or both", at his election, were intended to do away with the rules which denied representation, in whole or in part, by counsel in criminal prosecutions, but were not aimed to compel the state to provide counsel for a defendant. At the least, such a construction by state courts and legislators can not be said to lack reasonable basis.

The statutes in force in the thirteen original states at the time of the adoption of the Bill of Rights are also illuminating. It is

[15] Chitty Criminal Law (5th Am. Ed.) Vol. 1, p. 406.

[16] Chitty, *supra*, Vol. I, p. 407; Rex v. Parkins, 1 C. & P. 314.

[17] 7 Will. 3, c. 3, § 1.

[18] 6 & 7 Will. 4, c. 114, §§ I and II.

[19] Rex v. White, 3 Camp. N. P. 97; Reg. v. Boucher, 8 C. & P. 655.

of interest that the matter of appointment of counsel for defendants, if dealt with at all, was dealt with by statute rather than by constitutional provision. The contemporary legislation exhibits great diversity of policy.[20]

The constitutions of all the states, presently in force, save that of Virginia, contain provisions with respect to the assistance of counsel in criminal trials. Those of nine states[21] may be said to embody a guarantee textually the same as that of the Sixth Amendment or of like import. In the fundamental law of most states, however, the language used indicates only that a defendant is not to be denied the privilege of representation by counsel of his choice.[22]

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[20] Connecticut had no statute although it was the custom of the courts to assign counsel in all criminal cases. Swift, "System of Laws, Connecticut", 1796, Vol. II, p. 392. In Delaware Penn's Laws of 1719, ch. XXII and in Pennsylvania the Act of May 31, 1718, § III (Mitchell and Flanders' Statutes at Large of Penna., 1682-1801, Vol. III, p. 201) provided for appointment only in case of "felonies of death". Georgia has never had any law on the subject. Maryland had no such law at the time of the adoption of the Bill of Rights. An Act of 1777 in Massachusetts gave the right to have counsel appointed in cases of treason or misprision of treason. Laws of the Commonwealth of Massachusetts from Nov. 28, 1780 to Feb. 28, 1807, Ch. LXXI, Vol. II, Appendix, p. 1049. By an Act of Feb. 8, 1791, New Hampshire required appointment in all cases where the punishment was death. Metcalf's Laws of New Hampshire, 1916, Vol. 5, pp. 596, 599. An Act of New Jersey of Mch. 6, 1795, § 2, required appointment in the case of any person tried upon an indictment. Acts of the General Assembly of the Session of 1794, Ch. DXXXII, p. 1012. New York apparently had no statute on the subject. See Act Feb. 20, 1787, Laws of New York, Sessions 1st to 20th (1798), Vol. I, pp. 356-7. An Act of 1777 of North Carolina made no provision for appointment, but accorded defendants the right to have counsel. Laws of North Carolina, 1789, pp. 40, 56. Rhode Island had no statute until 1798 when one was passed in the words of the Sixth Amendment. Laws 1798, p. 80. South Carolina, by Act of August 20, 1731, limited appointment to capital cases. Grimke's So. Car. Pub. Laws, 1682-1790, p. 130. Virginia, by Act of Oct. 1786, enacted with respect to one charged with treason or felony that "the court shall allow him counsel . . . if he desire it.". Hening's Statutes of Virginia, 1785-1788, Vol. 12, p. 243.

[21] *Georgia* (Art. I, Par. V); *Iowa* (Art. I, Sec. 10); *Louisiana* (Art. I, Sec. 9; *Michigan* (Dec. of Rights, Art. II, Sec. 19); *Minnesota* (Art. I, Sec. 6); *New Jersey* (Art. I, Sec. 8); *North Carolina* (Art. I, Sec. 11); *Rhode Island* (Art. I, Sec. 10); *West Virginia* (Art. III, Sec. 14).

[22] Some assert the right of a defendant "to appear and defend in person and by counsel". *Arizona* (Art. II, Sec. 24); *Colorado* (Art. II, Sec. 16); *Illinois* (Art. II, Sec. 9); *Missouri* (Art. II, Sec. 22); *Montana* (Art. III, Sec. 16); *New Mexico* (Art. II, Sec. 14); *South Dakota* (Art. VI, Sec. 7); *Utah* (Art. I, Sec. 12); *Wyoming* (Art. I, Sec. 10). Others phrase the right as that "to be heard by himself and [his] counsel": *Arkansas* (Art. II, Sec. 10); *Delaware* (Art. I, Sec. 7); *Indiana* (Art. I, Sec. 13); *Kentucky* (Bill of Rights, Sec. 11); *Pennsylvania* (Art. I, Sec. 9); *Tennessee* (Art. I, Sec. 9); *Vermont* (Ch. I, Art. 10th); or "by himself and by counsel"; *Connecticut* (Art. I, Sec. 9) or "by himself and counsel": *New Hampshire* (Bill of Rights, 15th); *Oklahoma* (Art. II, Sec. 20); *Oregon* (Art. I, Sec. 11); *Wisconsin*

In three states the guarantee, whether or not in the exact phraseology of the Sixth Amendment, has been held to require appointment in all cases where the defendant is unable to procure counsel.[23] In six the provisions (one of which is like the Sixth Amendment) have been held not to require the appointment of counsel for indigent defendants.[24] In eight, provisions, one of which is the same as that of the Sixth Amendment, have evidently not been viewed as requiring such appointment, since the courts have enforced statutes making appointment discretionary, or obligatory only in prosecutions for capital offenses or felonies.[25]

In twelve states it seems to be understood that the constitutional provision does not require appointment of counsel, since statutes of greater or less antiquity call for such appointment only in

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(Art I, Sec. 7); or "by himself and counsel or either": *Alabama* (Art. I, Sec. 6); "by himself or counsel or [by] both": *Florida* (Dec. of Rights, Sec. 11); *Mississippi* (Art. III, Sec. 26); *South Carolina* (Art. I, Sec. 18); *Texas* (Art. I, Sec. 10). The verbiage sometimes employed is: "to appear and defend in person and with counsel": *California* (Art. I, Sec. 13), *Idaho*, (Art. I, Sec. 13); *North Dakota* (Art. I, Sec. 13) *Ohio* (Art. I, Sec. 10); or "in person or by counsel": *Kansas* (Bill of Rights, Sec. 10); *Nebraska* (Art. I, Sec. 11); *Washington* (Art. I, Sec. 22). *Nevada* (Art. I, Sec. 8) and *New York* (Art. I, Sec. 6) add: "as in civil actions". Some constitutions formulate the right as one "to be heard by himself and his counsel at his election" or "himself and his counsel or either at his election": *Massachusetts* (Part I, Sec. 12), *Maine* (Art. I, Sec. 6). *Maryland* (Dec. of Rights, Art. 21) states the right as that "to be allowed counsel".

[23] Elam v. Johnson, 48 Ga. 348; Delk v. State, 99 Ga. 667, 26 S. E. 752; Fugate v. Comm., 254 Ky. 663, 72 S. W. 2d 47; Carpenter v. Dane, 9 Wis. 274.

[24] Cutts v. State, 54 Fla. 21, 45 So. 491; McDonald v. Comm., 173 Mass. 322, 53 N. E. 874; People v. Dudley, 173 Mich. 389, 138 N. W. 1044; People v. Williams, 225 Mich. 133; People v. Harris, 266 Mich. 317; People v. Crandell, 270 Mich. 124, 258 N. W. 224; Comm. v. Smith, 344 Pa. 41, 24 A. 2d 1; State v. Sweeney, 48 S. D. 248, 203 N. W. 460; State v. Yoes, 67 W. Va. 546, 68 S. E. 181; cf. Pardee v. Salt Lake County, 39 Utah 482, 118 P. 122.

[25] *Alabama:* Code (1940) Tit. 15, Sec. 318; Campbell v. State, 182 Ala. 18, 62 S. 57; Gilchrist v. State, 234 Ala. 73, 173 S. 651; Clark v. State, 239 Ala. 380, 195 S. 260. *Louisiana:* Code Crim. Proc. (Dart, 1932) Tit. XIII, Art. 143; State v. Davis, 171 La. 449, 131 S. 295. *Maryland:* Annotated Code (Flack, 1939); Art. 26, Par. 7, p. 1060; cf. the decision below and Coates v. Maryland, decided by the Court of Appeals of Maryland April 22, 1942. *Mississippi:* Annotated Code (1930) Crim. Proc. Ch. 21, Sec. 1262; Laws 1934 Ch. 303; Reed v. State, 143 Miss. 686, 109 S. 715; Robinson v. State, 178 Miss. 568, 173 S. 451. *Rhode Island:* General Laws 1938, Ch. 625, Sec. 62; Acts & Resolves, 1891, Ch. 921, p. 165; State v. Hudson, 55 R. I. 141, 179 A. 130. *South Carolina:* Code 1932, Vol. 1, § 979; State v. Jones, 172 S. C. 129, 173 S. E. 77. *Texas:* Lopez v. State, 46 Tex. Cr. 473, 80 S. W. 1016; Faggett v. State, 122 Tex. Cr. 399; Thomas v. State, 106 S. W. 2d 289; Austin v. State, 51 S. W. 249. *Vermont:* Public Laws (1933) Ch. 57, Sec. 1424; Ch. 101, Sec. 2327; Ch. 102, Sec. 2370; State v. Gomez, 89 Vt. 490, 96 A. 190.

capital cases or cases of felony or other grave crime,[26] or refer the matter to the discretion of the court.[27] In eighteen states the statutes now require the court to appoint in all cases where defendants are unable to procure counsel.[28] But this has not always been the statutory requirement in some of those states.[29] And it seems to have been assumed by many legislatures that the matter was one for regulation from time to time as deemed neces-

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[26] *Arkansas:* Steel & McCampbell's Compiled Laws of Arkansas Territory, 1835, "Crimes and Misdemeanors", Sec. 37, p. 194; Gantt's Digest of Ark. Stats. 1874, Crim. Proc. Chap. 43, Art. XII, § 1824, p. 410; Pope's Digest (1937), Vol. 1, chap. 43, § 3877, p. 1180. *Delaware:* Penn's Laws, Chap. XXII (1719); Rev. Code (1935) chap. 114, 4305-6. *Kansas:* Gen. Stats. 1868, chap. 82, § 160, p. 845; Gen. Stats. 1935, Chap. 62, § 1304, p. 1449. *Maine:* Act of March 8, 1826, § 6, p. 146; R. S. Apr. 17, 1857, Chap. 134, § 12, p. 713; R. S. 1930, Chap. 146, § 14, p. 1655. *Minnesota:* Act of March 5, 1869, G. L. 1869, Chap. LXXII, § 1; Mason's Minn. Stats. (1927) Vol. 2, ch. 94, § 9957. *Missouri:* Casselberry's Rev. Stats. 1845, pp. 434, 443-4, 458; Rev. Stats. (1939) Crim. Proc. § 4003. *Nebraska:* Geh. Stats. 1873, Ch. 58, § 437, p. 821; Comp. Stat. (1929) Crim. Proc. Art. 18, Sec. 29-1803. *New Hampshire:* R. S. 1843, Tit. XXVII, Ch. 225, p. 457; Pub. Laws (1926), Ch. 368, Laws 1937, c. 22. *Washington:* Territorial Stats. 1881, Ch. LXXXV, § 1063; Rem. Rev. Stats. Vol. 4, Ch. 2, § 2305.

[27] *Arizona:* Code (1939) Art. 9, §§ 44-904, 44-905. *Colorado:* Colo. Stats. Annotated (1935), Vol. 2, Chap. 48, § 502, p. 1148. *Maryland:* Laws 1886, ch. 46, p. 66; Anno. Code (Flack, 1939), Art. 26, par. 7.

[28] *California*, Penal Code, Deering (1937), Pt. 2, Tit. 6, c. 1, § 987; *Idaho*, Code Anno. (1932) § 19-1412; *Illinois*, R. S. 1935, c. 38, ¶ 754; *Iowa*, Code 1939, c. 640, § 13773; *Kansas*, Laws 1941, c. 291; *Michigan*, Statutes Ann. § 28.1253; *Montana*, Rev. Codes Ann. (1935) c. 73, § 11886; *Nevada*, Comp. Laws (1929) Cr. L. & Proc. § 10883; *New Jersey*, N. J. Stat. Ann. § 2:190-3; *New York*, Thompson's Laws (1939) Pt. II, Code of Crim Proc. § 308; *North Dakota*, Comp. Laws (1913) Vol. II, § 8965; *Ohio*, Throckmorton's Code Ann. (1940) § 13439-2; *Oklahoma*, Stats. Ann. Tit. 22, § 1271; *Oregon*, Comp. Laws Ann. Vol. 3, § 26-804; *South Dakota*, Code (1939) § 34.1901; *Tennessee*, Michie's Code (1938), § 11734; *Utah*, R. S. (1938) Code Cr. Proc. § 105-22-12; *Wyoming:* R. S. (1931) §33-501. Connecticut provides official public defenders available to all persons unable to retain counsel. G. S. (Revision of 1930), c. 335, § 6476.

At least as early as 1903 (3 Edw. 7, c. 38) England adopted a Poor Prisoners' Defence Act under which a rule was adopted whereby an accused might defend by counsel assigned by the court. Bowen-Rowlands, Criminal Proceedings, London (1904) pp. 46-47. The existing statute is the Poor Prisoners' Defence Act (1930) 20 & 21, Geo. 5, c. 32. See Archbold's Criminal Pleading, Evidence and Practice, 30th Ed. (1938) p. 167. Under this act a poor defendant is entitled as of right to counsel on a charge of murder but assignment of counsel is discretionary in other cases.

[29] See e. g. earlier and more restricted statutes: *Idaho* Terr. Laws, 2d Sess., 1864, ch. II, p. 246; *Iowa*, Act of January 4, 1839, § 64; Korf *v.* Jasper County, 132 Ia. 682, 108 N. W. 1031; *Michigan*, Laws 1857, Act #109, p. 239; *Montana*, Act, January 12, 1872, Ch. IX, § 196; *Nevada*, Comp. L. 1861-73; Chap. LIII. Changes in the statutes of other states might be cited. Compare Notes 20 and 28.

sary, since laws requiring appointment in all cases have been modified to require it only in the case of certain offenses.[30]

This material demonstrates that, in the great majority of the states, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial. On the contrary, the matter has generally been deemed one of legislative policy. In the light of this evidence we are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the states, whatever may be their own views, to furnish counsel in every such case. Every court has power, if it deems proper, to appoint counsel where that course seems to be required in the interest of fairness.

The practice of the courts of Maryland gives point to the principle that the states should not be straight-jacketed in this respect, by a construction of the Fourteenth Amendment. Judge Bond's opinion states, and counsel at the bar confirmed the fact, that in Maryland the usual practice is for the defendant to waive a trial by jury. This the petitioner did in the present case. Such trials, as Judge Bond remarks, are much more informal than jury trials and it is obvious that the judge can much better control the course of the trial and is in a better position to see impartial justice done than when the formalities of a jury trial are involved.[31]

In this case there was no question of the commission of a robbery. The State's case consisted of evidence identifying the petitioner as the perpetrator. The defense was an alibi. Petitioner called and examined witnesses to prove that he was at another place at the time of the commission of the offence. The simple issue was the veracity of the testimony for the State and that for the defendant. As Judge Bond says, the accused was not helpless, but was a man forty-three years old, of ordinary intelligence and ability to take care of his own interests on the trial of that

[30] *Louisiana.* Compare Laws, 1855, Act No. 121; State v. Ferris, 16 La. Ann. 424; State v. Bridges, 109 La. 330, 33 S. 589, with La. Code Crim. Proc. (Dart) 1932, Tit. XIII, Art. 143. *Nebraska.* Compare Laws of 1869, p. 163, with Comp. Stats. (1929) § 29-1803. *Washington.* Compare Code of Washington Terr. (1881), ch. LXXXV, § 1063 with Rem. Rev. Stats. Vol. 4, ch. 2, § 2305. And compare Texas Code Crim. Proc. (1856), Pt. III, Arts. 466-7 with Vernon's Stats. (1936), Art. 1917, and Lopez v. State, 46 Tex. Cr. 473, 80 S. W. 1016, and Thomas v. State, 106 S. W. 2d 289.

[31] Judge Bond adds: "Certainly my own experience in criminal trials over which I have presided (over 2000, as I estimate it), has demonstrated to me that there are fair trials without counsel employed for the prisoners."

narrow issue. He had once before been in a criminal court, pleaded guilty to larceny and served a sentence and was not wholly unfamiliar with criminal procedure. It is quite clear that in Maryland, if the situation had been otherwise and it had appeared that the petitioner was, for any reason, at a serious disadvantage by reason of the lack of counsel, a refusal to appoint would have resulted in the reversal of a judgment of conviction. Only recently the Court of Appeals has reversed a conviction because it was convinced on the whole record that an accused tried without counsel had been handicapped by the lack of representation.[32]

To deduce from the due process clause a rule binding upon the states in this matter would be to impose upon them, as Judge Bond points out, a requirement without distinction between criminal charges of different magnitude or in respect of courts of varying jurisdiction. As he says: "Charges of small crimes tried before justices of the peace and capital charges tried in the higher courts would equally require the appointment of counsel. Presumably it would be argued that trials in the Traffic Court would require it." And indeed it was said by petitioner's counsel both below and in this court, that as the Fourteenth Amendment extends the protection of due process to property as well as to life and liberty, if we hold with the petitioner logic would require the furnishing of counsel in civil cases involving property.

As we have said, the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.

The judgment is affirmed.

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[32] Coates v. State (Court of Appeals of Maryland, decided April 22, 1942, not yet reported).

SUPREME COURT OF THE UNITED STATES.

No. 837.—October Term, 1941.

Smith Betts, Petitioner, *vs.* Patrick J. Brady, Warden of the Penitentiary of Maryland.	On Writ of Certiorari to Hon. Carroll T. Bond, a Judge of the State of Maryland, being a Judge of the Court of Appeals of Maryland from the City of Baltimore.

[June 1, 1942.]

Mr. Justice Black, dissenting, with whom Mr. Justice Douglas and Mr. Justice Murphy concur.

To hold that the petitioner had a constitutional right to counsel in this case does not require us to say that "no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel." This case can be determined by resolution of a narrower question: whether in view of the nature of the offense and the circumstances of his trial and conviction, this petitioner was denied the procedural protection which is his right under the federal constitution. I think he was.

The petitioner, a farm hand, out of a job and on relief, was indicted in a Maryland state court on a charge of robbery. He was too poor to hire a lawyer. He so informed the court and requested that counsel be appointed to defend him. His request was denied. Put to trial without a lawyer, he conducted his own defense, was found guilty, and was sentenced to eight years' imprisonment. The court below found that the petitioner had "at least an ordinary amount of intelligence." It is clear from his examination of witnesses that he was a man of little education.

If this case had come to us from a federal court, it is clear we should have to reverse it, because the sixth amendment makes the right to counsel in criminal cases inviolable by the federal government. I believe that the fourteenth amendment made the sixth applicable to the states.[1] But this view, although often urged in

[1] Discussion of the fourteenth amendment by its sponsors in the Senate and House shows their purpose to make secure against invasion by the states the fundamental liberties and safeguards set out in the Bill of Rights. The legislative history and subsequent course of the amendment to its final adoption have been discussed in Flack, "The Adoption of the Fourteenth Amend-

dissents, has never been accepted by a majority of this Court and is not accepted today. A statement of the grounds supporting it is, therefore, unnecessary at this time. I believe, however, that under the prevailing view of due process, as reflected in the opinion just announced, a view which gives this Court such vast supervisory powers that I am not prepared to accept it without grave doubts, the judgment below should be reversed.

This Court has just declared that due process of law is denied if a trial is conducted in such manner that it is "shocking to the universal sense of justice" or "offensive to the common and fundamental ideas of fairness and right." On another occasion this Court has recognized that whatever is "implicit in the concept of ordered liberty" and "essential to the substance of a hearing" is within the procedural protection afforded by the constitutional guaranty of due process. *Palko* v. *Connecticut*, 302 U. S. 319, 325, 327.

The right to counsel in a criminal proceeding is "fundamental." *Powell* v. *Alabama*, 287 U. S. 45, 70; *Grosjean* v. *American Press Co.*, 297 U. S. 233, 243-244. It is guarded from invasion by the sixth amendment, adopted to raise an effective barrier against arbitrary or unjust deprivation of liberty by the federal government. *Johnson* v. *Zerbst*, 304 U. S. 458, 462.

An historical evaluation of the right to a full hearing in criminal cases and the dangers of denying it were set out in the *Powell* case where this Court said: "What . . . does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the person asserting the right . . . . Even the intelligent and educated layman . . . . lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel in every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Powell* v. *Alabama*, *supra*, 68-69. Cf. *Johnson* v. *Zerbst*, *supra*, 462-463.

A practice cannot be reconciled with "common and fundamental ideas of fairness and right", which subjects innocent men to in-

ment." Flack cites the Congressional debates, committee reports, and other data on the subject. Whether the amendment accomplished the purpose its sponsors intended has been considered by this Court in the following decisions, among others: O'Neil v. Vermont, 144 U. S. 323, dissent, 337; Maxwell v. Dow, 176 U. S. 581, dissent, 605; Twining v. New Jersey, 211 U. S. 78, 98-99, dissent, 114.

creased dangers of conviction merely because of their poverty. Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty, that the defendant's case was adequately presented. No one questions that due process requires a hearing before conviction and sentence for the serious crime of robbery. As the Supreme Court of Wisconsin said in 1859, ". . . would it not be a little like mockery to secure to a pauper these solemn constitutional guaranties for a fair and full trial of the matters with which he was charged, and yet say to him when on trial, that he must employ his own counsel, who could alone render these guaranties of any real permanent value to him. . . . Why this great solicitude to secure him a fair trial if he cannot have the benefit of counsel?" *Carpenter* v. *Dane County*, 9 Wis. 274, 276-277.

Denial to the poor of the request for counsel in proceedings based on charges of serious crime has long been regarded as shocking to the "universal sense of justice" throughout this country. In 1854, for example, the Supreme Court of Indiana said: "It is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty, shall be debarred of counsel because he was too poor to employ such aid. No Court could be respected, or respect itself, to sit and hear such a trial. The defence of the poor, in such cases, is a duty resting somewhere, which will be at once conceded as essential to the accused, to the Court, and to the public." *Webb* v. *Baird*, 6 Ind. 13, 18. And most of the other states have shown their agreement by constitutional provisions, statutes, or established practice judicially approved which assure that no man shall be deprived of counsel merely because of his poverty.[2] Any other practice seems to me to defeat the promise of our democratic society to provide equal justice under the law.

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[2] In thirty-five states, there is some clear legal requirement or an established practice that indigent defendants in capital as well as serious non-capital criminal cases (*e. g.*, where the crime charged is a felony, a "penitentiary offense", an offense punishable by imprisonment for several years) be provided with counsel on request. In nine states, there are no clearly controlling statutory or constitutional provisions and no decisive reported cases on the subject. In two states, there are dicta in judicial decisions indicating a probability that the holding of the court below in this case would be followed under similar circumstances. In only two states (including the one in which this case arose) has the practice here upheld by this Court been affirmatively sustained. Appended to this opinion is a list of the several states divided into these four categories.

APPENDIX.

I. States which require that indigent defendants in capital as well as non-capital criminal cases be provided with counsel on request:

A. *By statute.* ARIZONA: Revised Statutes of Arizona Territory, 1901, Penal Code, Pt. II, Title VII, § 858; Arizona Code Ann. 1939, Vol. III, § 44-904. ARKANSAS: Compiled Laws, Arkansas Territory, 1835, Crimes and Misdemeanors, § 37; Pope's Digest, 1937, Vol. I, c. 43, § 3877. CALIFORNIA: California Penal Code of 1872, § 987; Deering's Penal Code, 1937, § 987. IDAHO: Territorial Criminal Practice Act, 1864, § 267; Idaho Code, 1932, §§ 19-1412, 19-1413. ILLINOIS: Rev. Stat. 1874, Criminal Code, § 422; Jones's Ill. Stat. Ann. 1936, § 37.707. *Cf.* Laws, 1933, 430-431. See also, Vise *v.* County of Hamilton, 19 Ill. 78, 79 (1857). IOWA: Territorial Laws, 1839, Courts, § 64; Iowa Code, 1939, § 13773. KANSAS: See compilation published in 1856 as S. Doc. No. 23, 34th Cong., 1st Sess., 520 (C. 129, Art. V, § 4). Laws, 1941, c. 291. LOUISIANA: Act of May 4, 1805, of the Territory of Orleans, § 35; Dart's Louisiana Code of Criminal Procedure, 1932, Title XIII, Art. 143. MINNESOTA: Minnesota General Laws, 1869, c. LXXII, § 1; Mason's Minnesota Statutes, 1927, §§ 9957, 10667. MISSOURI: Digest of Laws of Missouri Territory, 1818, Crimes and Misdemeanours, § 35; Rev. Stat. 1939, § 4003. MONTANA: Montana Territory Criminal Practice Act of 1872, § 196 (Laws of Montana, Codified Stat. 1871-1872, 220); Revised Code, 1935, § 11886. NEBRASKA: General Statutes, 1873, c. 42, § 437; Compiled Stat. 1929, § 29-1803. NEVADA: Act of November 26, 1861 (Compiled Laws, 1861-1873, Vol. I, 477, 493); Compiled Laws, 1929, Vol. 5, § 10883. NEW HAMPSHIRE: Laws, 1907, c. 136; Laws, 1937, c. 22. NEW JERSEY: Act of March 6, 1795, § 2; New Jersey Stat. § 2.190-3. NEW YORK: Code of Criminal Procedure, § 308 (enacted in 1881, still in force). See People *v.* Supervisors of Albany County, 28 How. Pr. 22, 24 (1864). NORTH DAKOTA: Dakota Territory Code of Procedure, 1863, § 249 (Rev. Codes, 1877, Criminal Procedure 875); Compiled Laws, 1913, Vol. II, §§ 9965, 10721. OHIO: Act of February 26, 1816, § 14 (Chase, Statutes of Ohio, 1788-1833, Vol. II, 982); Throckmorton's Ohio Code Ann., 1940, Vol. II, § 13439-2. OKLAHOMA: Oklahoma Territorial Stat., 1890, c. 70, § 10; Stat. Ann. 1941 Supp., Title 22, § 464. OREGON: Act of October 19, 1864 (General Laws, 1845-1864, c. 37, § 381; Laws 1937, c. 406 (Compiled Laws Ann., Vol. III, § 26-804). SOUTH DAKOTA: Dakota Territory Code of Procedure, 1863, § 249 (Rev. Codes, 1877, Criminal Procedure 875); Code of 1939, Vol. II, § 34.1901. TENNESSEE: Code of 1857-

1858, §§ 5205, 5206; Code of 1938, §§ 11733, 11734. UTAH: Laws of Territory of Utah, 1878, Criminal Procedure, § 181; Rev. Stat. 1933, § 105-22-12. WASHINGTON: Statutes of Territory of Washington, 1854, Criminal Practice Act, § 89; Remington's Revised Statutes, 1932, Vol. IV, §§ 2095, 2305. WYOMING: Laws of Wyoming Territory, 1869, Criminal Procedure, § 98; Rev. Stat. 1931, § 3-501.

By judicial decision or established practice judicially approved. CONNECTICUT: For an account of early practice in Connecticut, see Zephaniah Swift "A System of the Laws of the State of Connecticut", Vol. II, 392: "The chief justice then, before the prisoner is called upon to plead, asks the prisoner if he desires counsel, which if requested, is always granted, as a matter of course. On his naming counsel, the court will appoint or assign them. If from any cause, the prisoner decline to request or name counsel, and a trial is had, especially in the case of minors, the court will assign proper counsel. When counsel are assigned, the court will inquire of them, whether they have advised with the prisoner, so that he is ready to plead, and if not, will allow them proper time for that purpose. But it is usually the case that the prisoner has previously employed and consulted counsel, and of course is prepared to plead." See Powell v. Alabama, 287 U. S. 45, footnote, 63-64. See also, Connecticut General Statutes, Revision of 1930, §§ 2267, 6476. FLORIDA: Cutts v. State, 54 Fla. 21, 23 (1907). See Compiled General Laws, 1927, § 8375 (capital crimes). INDIANA: Webb v. Baird, 6 Ind. 13, 18 (1854). See also Knox County Council v. State ex rel. McCormick, 217 Ind. 493, 497-498 (1940); State v. Hilgemann, 34 N. E. 2d 129, 131 (1941). MICHIGAN: People v. Crandell, 270 Mich. 124, 127 (1935). PENNSYLVANIA: Commonwealth v. Richards, 111 Pa. Super. 124 (1933). See Com. ex rel. McGlinn v. Smith, 344 Pa. 41, 49, 59. VIRGINIA: Watkins v. Commonwealth, 174 Va. 518, 521-525 (1940). WEST VIRGINIA: State v. Kellison, 56 W. Va. 690, 692-693 (1904). WISCONSIN: Carpenter v. Dane County, 9 Wis. 274 (1859). See Stat. 1941, § 357.26.

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C. *By constitutional provision.* GEORGIA: Constitution of 1856, Art. 1, Par. 8. See Martin v. Georgia, 51 Ga. 567, 568 (1874). KENTUCKY: Kentucky Constitution, § 11. See Fugate v. Commonwealth, 254 Ky. 663, 665 (1934).

II. States which are without constitutional provision, statutes, or judicial decisions clearly establishing this requirement:

COLORADO: General Laws, 1877, §§ 913-916; Colorado Stat. Ann. 1935, Vol. 2, c. 48, §§ 502, 505, as amended

by Laws of 1937, 498, § 1. See Abshier *v.* People, 87 Col. 507, 517. DELAWARE: See 6 Laws of Delaware 741; 7 *id.* 410; Rev. Code, 1935, §§ 4306, 4310. MAINE: See Rev. Stat. 1857, 713; Rev. Stat. 1930, c. 146, § 14. MASSACHUSETTS: See McDonald v. Commonwealth, 173 Mass. 322, 327 (1899). NEW MEXICO. NORTH CAROLINA. RHODE ISLAND: See State *v.* Hudson, 55 R. I. 141 (1935); General Laws, 1938, c. 625, § 62. SOUTH CAROLINA: See State *v.* Jones, 172 S. C. 129, 130 (1934); Code, 1932, Vol. I, § 980. VERMONT.

III. States in which dicta of judicial opinions are in harmony with the decision by the court below in this case:

ALABAMA: Gilchrist *v.* State, 234 Ala. 73, 74. MISSISSIPPI: Reed *v.* State, 143 Miss. 686, 689.

IV. States in which the requirement of counsel for indigent defendants in non-capital cases has been affirmatively rejected:

MARYLAND: See, however, Coates *v.* State (Court of Appeals of Maryland, decided April 22, 1942). TEXAS: Gilley *v.* State, 114 Tex. Cr. 548. But *cf.* Brady *v.* State, 122 Tex. Cr. 275, 278.